In The

Supreme Court of the United States

October Term, 1978

No. 78-192

J. JEROME OLITT,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

REPLY BRIEF OF PETITIONER IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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Preliminary Statement

Petitioner, J. JEROME OLITT, files this reply brief in further support of his Petition for a Writ of Certiorari.

Argument

RESPONDENT HAS FAILED TO RAISE ANY REASON FOR THE DENIAL OF THE PETITION

A. RESPONDENT'S CLAIM THAT THE NEW YORK COURTS DID NOT BAR PETITIONER FROM ACCESS TO THE FEDERAL COURTS IS ERRONEOUS.

Following the resolution of the state issues by the Referee, the Grievance Committee moved to confirm the Referee's Report and to impose discipline. The Petitioner cross-moved to stay the imposition of discipline pending his return to the Federal District Court for the resolution of his federal constitutional claims, pursuant to that provision of his Answer to the Petition which expressly reserved his right to litigate his federal questions in the Federal Court.

The Referee's Report was confirmed in all respects, the cross-motion for a stay denied, and Petitioner was suspended from the practice of law for three (3) years.

Accordingly, the New York Courts barred Petitioner from access to the Federal Court prior to the imposition of discipline upon him.

B. RESPONDENT'S CLAIM THAT PETITIONER'S FIFTH AMENDMENT QUESTION IS INSUBSTANTIAL AND DOES NOT MERIT REVIEW IS ERRONEOUS.

The fact that the Courts of the State of New York disagree with Petitioner's contention that his rights under the Fifth Amendment of the United States Constitution were violated by the use of his

immunized Grand Jury testimony as part of the case and chief against him in the State Court disciplinary proceeding is a bar to this Court's interpretation of the Petitioner's Fifth Amendment rights.

This point presents a novel question yet to be decided by this Court. This case has already stated in Matter of Ruffalo, 20 L.Ed.2d. 1436 and the Second Circuit has likewise held in Erdmann v. Stevens, 458 F.2d. 1211 that the practice of law is a privilege, and once granted it may not be taken away without due process of law. Additionally, these cases also stand for the principle that attorney disciplinary proceedings are quasi-criminal in nature.

Petitioner had received a transactional immunity in connection with this testimony before the Grand Jury by a State Officer expressly authorized to commence attorney disciplinary proceedings. Furthermore, this Officer promised that he would not initiate or refer the matter to the Grievance Committee.

Such a state of facts presents to this Court, we believe, for the first time, a question as to whether immunized Grand Jury testimony may be used against an attorney in a State Court disciplinary proceeding.

Petitioner's claim of the violations of his privilege against self-incrimination raises an issue similar to a case in which this Court granted review (77-1489, New Jersey v. Portash, 6/12/78). In that case, the question was whether the privilege against self-incrimination was violated by a decision allowing prosecutors to use immunized Grand Jury testimony

to impeach a defendant's trial testimony. The New Jersey Superior Court, Appeals Division, ruled that it is and reversed a conviction after an extortion defendant decided not to testify in his own behalf because the Trial Court intended to allow the impeachment.

C. RESPONDENT'S CLAIM THAT THE QUESTION OF THE "PROMISE" IS BASED UPON A MISSTATEMENT OF RECORD IS LIKEWISE ERRONEOUS.

In claiming that Petitioner's Question Presented is based on a flagrant misstatement of record, the Respondent states that the State Court Referee, after a full trial of the matter, found that the Respondent had failed to prove by a fair preponderance of the credible evidence that the District Attorney of New York County, by its Assistant, Frank J. Rogers, made the promise to Petitioner or his attorneys that he would not initiate or refer the matter to the Grievance Committee. However, as explained carefully in the Petition, the Petitioner relies upon his right to have his federal claims determined by a Federal Court. How the facts are found often dictates the decision of federal claims. Petitioner claims that he has been denied the opportunity of a Federal Court's role in formulating the record and that he may not be unwillingly deprived of a Federal Court's determination of his federal claims.

D. PETITIONER'S FOURTH QUESTION PRESENTS A GRIEVOUS DUE PROCESS ISSUE.

Petitioner claims that Section 190.25.5 of the New York Criminal Procedure Law, which permits

the disclosure of Grand Jury minutes upon application, is unconstitutional to the extent that such application to the Court may be made in an ex-parte manner, without notice to the witnesses who testified before the Grand Jury, and without affording to those witnesses an opportunity to be heard. The New York State's holding in People v. DiNapoli, 27 N.Y.2d. 229 (1970) to the contrary is not binding upon this Court. Such flagrant lack of due process violates this Court's decisions which clearly define that at a minimum, due process requires notice of the application and an opportunity to be heard in opposition.

E. PETITIONER'S FIFTH QUESTION PRESENTS ISSUES NEVER CLEARLY DEFINED BY THIS COURT.

In his fifth question, the Petitioner claimed that the State Court's denial of Petitioner's claim of extreme prejudice (that the witnesses died, etc.) by the virtue of the unjustified and unreasonable prosecutorial delay in the prosecution of the State Court proceeding is contrary to this Court's decision in the Matter of Ruffalo, 20 L.Ed.2d. 1436; Barker v. Wingo, 407 U.S. 514; Klopher v. North Carolina, 386 U.S. 213; and Spevack v. Klein, 386 U.S. 511. Respondent argues that the Sixth Amendment refers only to criminal trials. Petitioner argues that disciplinary proceedings are quasi-criminal in nature and to that extent Sixth Amendment rights apply.

Furthermore, even if Sixth Amendment rights did not apply, laches should act to bar the proceeding.

The Appellate Division of New York Supreme Court, itself, in its formal opinion, included the following paragraph:

> "The petitioner learned of respondent's misconduct in January, 1970 and began proceedings in 1973."

Accordingly, the three (3) year delay went totally unexplained.

CONCLUSION

Petitioner respectfully prays that for the reasons set forth in his Petition, and for the reasons set forth hereinbefore, his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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DATED: New York, New York

August 24th, 1978.